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Espionage laws used to plug leaks

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Washington

After decades of looking in frustration for a way to deal with leaks of its secrets, the government seems to have found the solution: convict the leakers of a crime and put them in prison.

That solution, it now appears, has been available for many decades. It simply was never used successfully until just this month, when a federal court jury in Baltimore found a Navy intelligence analyst guilty of illegal leaking.

Although there is no law on the books that says explicitly that leaking can be a crime, Samuel L. Morison was convicted of violating the Espionage Act of 1917, and a law against theft of government property which dates back more than a century.

The verdict is going to be appealed, and it may take a Supreme Court decision to make it finally clear whether those laws are available to deal with leakers.

The guilty verdict, which could lead to a maximum of 40 years in prison and $40,000 in fines, can easily be read by legions of middle-level bureaucrats as a clear warning against leaking documents to the press. A conviction and time in prison would be a much stronger deterrent than losing a job or being disciplined for leaking.

It is those bureaucrats, often in possession of a good deal of secret information, who would be the prime targets of any future use of the laws that were used against Mr. Morison.

There is almost no chance, even in theory, that those laws would ever be used against a truly high-level official, such as a Cabinet officer or top-rank aides to a Cabinet secretary or at the White House — even though they, too, have been known often to use press leaks very creatively to try to influence a public policy debate.

Legally speaking, only the president would have the authority to leak documents that have been officially classified without breaking the law in doing so. But, as a matter of discretion among federal prosecutors, some of that same immunity seems to insulate other high-level officials, too.

What is not so clear in the wake of the Morison verdict, however, is its potential meaning to reporters who accept secret documents and write or broadcast stories about them.

Civil liberties lawyers who followed the case seem absolutely convinced that the press' opportunity to cover national defense and diplomatic policy will suffer as a result of the interpretation that U.S. District Judge Joseph H. Young gave to the laws on espionage and theft of documents in the case.

Morton H. Halperin, Washington director of the American Civil Liberties Union, said the outcome "will have a chilling effect on all public debate on national security matters. By threatening indictments under the statutes under which Mr. Morison was convicted, the government will be able to determine what information can be published."

Another attorney close to the case, who asked not to be identified, said that "the career people in government, who know a lot and can put policy into context, are the people who are really going to be intimidated. They are the people who enable the press to be something more than an administration mouthpiece."

Whatever the indirect impact on the press by shutting down sources of leaks, there is even less certainty whether the case means that reporters may themselves get into trouble in the future for their role in the business of leaking.

There is nothing about the laws used against Mr. Morison, as interpreted by Judge Young, that would exempt the press from prosecution for obtaining secrets and publishing them. No attempt has ever been made to use the laws that way.

Moreover, there is no exemption for reporters from being summoned before a federal grand jury to be compelled to say who their source was for such secrets, if the government wanted badly enough to find out. That has never been attempted, either.

Federal prosecutors have refused to say flatly that they would never bring a direct criminal charge against the press, or that they would never summon a reporter before a grand jury to discover a source. They have simply pointed out that the laws on espionage or on theft of government documents grant no express immunity to the press.

Still, the Reagan administration's top prosecutor, Assistant Attorney General Stephen S. Trott, said after the Morison verdict: "We are not out to trash the press. We are very mindful of the First Amendment, and of the legitimate functioning of the media."

The Morison case, he said, "is not a part of any plot or program" by the administration to cut off the flow of defense information. Rejecting the complaint of critics that the Morison case is part of an overall effort by the government to bring into being an American equivalent of Britain's Official Secrets Act, Mr. Trott commented: "I think there's a lot of unfounded and unnecessary hysteria going on out there about what it [the Morison case] means."

He added: "We don't sit down and write the laws ourselves. All I can do is read the statutes, and enforce them."

Asked if any cases directly aimed at the press could arise, he said "I can't say one way or the other whether, hypothetically, there would ever be a case that presented us with the facts that would produce such a case. I don't think it's at all helpful to speculate along those lines."

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The assistant attorney general, though, shows no similar hesitancy in talking about the Morison case as a direct signal to those in government with access to secrets. "The case does and should serve as a reminder for anybody handling this kind of information that there are laws against giving it out. That is true of every case you file: you expect it will have some deterrent effect."

What makes the Morison case so special, aside from its uniqueness as the first successful federal prosecution for leaking, is that it was a very uncertain test case when it first arose and yet became ultimately everything that federal prosecutors wanted it to be.

Time after time, one president's administration after another has been confronted with leaks — often of highly sensitive military or intelligence information — and has discovered that they could do next to nothing about it.

The Nixon administration was the first to try to do something about it by using the nation's criminal laws. When the "Pentagon Papers," a secret study of the background of the Vietnam war, was leaked to the press in 1971, the government first tried to stop the press from disclosing the contents, using the Espionage Act as the legal basis. (The press was not charged with any crime, however.)

After that effort failed in the Supreme Court, the government accused the alleged leakers, Daniel Ellsberg and Anthony J. Russo Jr. of the crimes of releasing secrets in violation of the Espionage Act, and stealing documents under the theft-of-property law.

Mr. Ellsberg and Mr. Russo had worked for the Rand Corporation, which did the study for the Pentagon.

Until that case, neither law had ever been employed against leaking to the press. The Espionage Act had been used only against those who gave secrets to foreign governments — "spies" or "saboteurs," in the traditional sense. And the theft law, when used at all against those who stole government information, had been used only when the information was obtained for private use in illegal enterprises.

But the Ellsberg and Russo cases failed as the first test of those laws as anti-leak statutes. U.S. District Judge William M. Byrne in 1973 threw out the charges because, in pursuing Mr. Ellsberg, federal investigators had broken into his psychiatrist's private office and had used illegal telephone wiretaps. Those actions had been carried out by the so-called "Plumbers unit," set up by White House aides to investigate the leaks.

Since the case ended that way, there was no clear-cut court precedent upholding the use of the two laws to punish leakers or plug leaks.

The leaks, of course, continued, ultimately leading the Reagan administration to make the next attempt to use the laws. President Reagan colorfully expressed the sentiment of many chief executives when he said: "I've had it up to my keister with these leaks."

An interdepartmental group set up by the administration to look into the whole issue had concluded that new laws probably were needed to punish leakers. The group's so-called "Willard Report," named for its chairman, Justice Department official Richard K. Willard, said the process of checking out leaks "has been so ineffectual as to perpetuate the notion that the government can do nothing to stop leaks of classified information."

It concluded that the Espionage Act and the theft-of-property law might be used against leakers, but it said it was not "entirely clear" that they applied.

It had become clear that one of the problems in dealing with leaks was that investigations sometimes turned up high-level officials as the actual sources of the leaks, and prosecutions simply would have been embarrassing.

But there was another problem, just as serious: the prosecution of a leaks case might force the government to reveal publicly more than it wanted about its intelligence-gathering system and about the harm done by the leaking of secrets.

It was against this background that the Morison case came onto the scene. As one lawyer who followed the case closely described it, it was a "no-lose proposition: if the government won, it would have the statutes as it wanted; if it lost, then a stronger plea could be made to Congress [for a new law]."

Moreover, the case involved a fairly low-level official, easily identified. But perhaps most importantly, the case appeared to be one that would not disturb intelligence officials too greatly because of courtroom revelations. The key documents allegedly stolen by intelligence analyst Morison were photographs taken with a secret intelligence satellite, the KH-11, but Soviet agents already had learned much about that satellite from another espionage leak.

Mr. Morison was accused of stealing those photographs from the place where he worked, the Naval Intelligence Support Center in Suitland, Md., and turning them over to a British publication, *Jane's Defence Weekly*, for which he served as American editor. He also was accused of passing on to Jane's copies of documents about a fire at a Soviet ammunition depot.

His defense lawyers had too main strategies for winning: first, convincing Judge Young that the Espionage Act applied only to release of secrets to foreign agents or governments and that the theft-of-property law did not apply to stealing classified information, and, second, convincing the jury that there was no proof that the disclosures had done even "potential" harm to U.S. security.

They lost on the first point last March, when the judge ruled that the laws do apply to leaks of government secrets to the press, and they lost on the second when the jury, given an instruction requested by prosecutors on the scope of "potential" damage, brought in its guilty verdict.

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